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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 69

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Petitioners,

—v.—

JACKSONVILLE TERMINAL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITION FOR REHEARING

The respondent respectfully petitions for a rehearing in this matter.

We would not have filed a Petition for Rehearing were it not for the extraordinary nature of the Court's decision, nor, indeed, in the absence of the opinion's candid admission that the "solution" it had reached is not "really satisfactory." Slip Opinion, p. 22.

The decision in this case is extraordinary in two principal respects:

1. The Court has applied an outmoded doctrine for the supersession or preemption of state law; this doctrine is reflective of certain Nineteenth Century and early Twentieth Century decisions of the Court, now generally thought to be discredited, which struck down state economic regulation of interstate business, notwithstanding the absence

of conflict with any existing Federal regulatory scheme or body of Federal substantive law.[1]

2. Moreover, here, the Court, after undertaking to strike down the application of state law on the grounds that state law was limited and inhibited by "paramount Federal policies of nationwide import" (Slip Opinion, p. 12), then declined to adjudicate the impact of these paramount Federal policies upon the legal dispute at bar. State law was held superseded not by any system of Federal regulation nor by any articulated system of Federal substantive law, but simply by the Court's holding that the subject matter demanded a uniform rule—which the Court then refused to articulate, saying that this was a matter best left to Congress.—Of course, no one would dispute that in this case once Congress had expressly laid down a substantive rule the state law could not govern; the question is whether

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[1] For examples of decisions taking this former approach, see *Brimmer* v. *Rebman*, 138 U.S. 78 (1891); *New York Central R. Co.* v. *Winfield*, 244 U.S. 147 (1917); *Erie R. Co.* v. *Winfield*, 244 U.S. 170 (1917); *Seaboard Air Line R. Co.* v. *Blackwell*, 244 U.S. 310 (1917); *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50 (1922). Indeed, since the state action in those cases imposed certain restrictions on interstate carriers or interstate movement—which the action here did not—this case can fairly be said to go further than even the cases mentioned, and indeed to stand alone.

The approach followed by this Court in more recent years has been to give the states considerable latitude in regulating interstate commerce and interstate carriers and, indeed, in applying that regulation interstitially where the matter is not specifically taken in hand by a generally applicable Federal statute, or by a Federal administrative regime. A very recent example is the Court's decision upholding the state "full crew" laws, *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R. I. & P. R. Co.*, 393 U.S. 129 (1968). Other examples include *Mintz* v. *Baldwin*, 289 U.S. 346 (1933); *Townsend* v. *Yeomans*, 301 U.S. 441 (1937); *Parker* v. *Brown*, 317 U.S. 341 (1943); *Rice* v. *Chicago Board of Trade*, 331 U.S. 247 (1947); *California* v. *Zook*, 336 U.S. 725 (1949); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714 (1963); *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132 (1963).

state law should be permitted to govern absent any controlling Federal substantive law.

We submit that the foregoing factors make this case an appropriate one for the grant of rehearing. Moreover, there are additional factors supporting this conclusion:

3. The question on which the Court's decision ultimately turned was not one fully briefed or argued by the parties. Our principal contention on the merits was that inasmuch as the state court injunction here did not interfere with any Federal regulatory regime and did not infringe any right affirmatively protected by Federal law, the injunction granted by the state courts should stand. See Brief for Respondent, pp. 26-38. On the other hand, the principal argument of the petitioners was that the union conduct here was affirmatively protected under the Clayton Act and the Norris-La Guardia Act (see Brief for Petitioners, pp. 42-61), and that, in any event, if the petitioners' conduct had occurred in an industry regulated by the Labor Management Relations Act, it would have been protected under that Act, and thus by analogy should be held protected here. *Id.*, at 61-65.

The Court accepted none of these contentions. It did not hold that Federal substantive law—the Clayton Act or the Norris-La Guardia Act—affirmatively sanctioned the conduct of the unions here. Nor did it hold that if petitioners' conduct had occurred in an industry governed by the LMRA, it would have been protected; the Court expressly declined to look into this question. Slip Opinion, p. 20. However, the Court also rejected our contention that absent conflict with a Federal regulatory regime or conflict with Federal substantive law, state law should not be held to be superseded.

Instead, the Court held that state law was superseded because of the necessity, as the Court saw it, for a uniform rule on the subject, even though the Court did not regard itself in a position to enunciate any uniform rule or to hold the conduct of the petitioners either lawful or unlawful as a matter of Federal law.—It is fair to say that the briefs and oral argument of neither party contemplated such an unusual result—that the Court would hold the parties' rights and duties exclusively governed by Federal law but then decline to say what that law is.

4. Finally, in discussing the sources from which a judicial judgment as to the legality of petitioners' conduct under Federal law could be derived—a judgment which it ultimately declined to make—the Court did not discuss many of the pertinent statutory and other materials. These materials were not canvassed extensively in the briefs and oral argument in the present case, because the basic question was whether the state was entitled to declare petitioners' conduct unlawful *as a matter of state law* and enjoin it on that basis. The materials relevant to the question of Federal legality were, however, analyzed at much greater length by the parties in the case arising out of the Federal injunction proceedings against the same union conduct in 1966, *Atlantic Coast Line R. Co.* v. *Brotherhood of Railroad Trainmen,* 385 U.S. 20 (1966), which resulted in a four-to-four division of the Court. That equal division of the Court did not, of course, authoritatively resolve the question of the legality of the petitioners' conduct under Federal law. This Court should not do so in the present case—even by declining to make a specific judgment and thus holding all the union conduct protected—without affording opportunity for full consideration of the point based on all the relevant materials.

In a rehearing addressed to the question of whether the Court should enunciate a Federal standard here, and what that standard should be, these materials, which in great part were not referred to in the Court's opinion, could be further developed by counsel. Among these would be the question, for example, whether the petitioners' conduct is unlawful as a matter of Federal law because it seeks to induce the nonstruck carriers to levy an embargo upon the FEC which is unlawful under the Interstate Commerce Act. For further details, see pp. 14-17, below.

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In the light of the extraordinary nature of the Court's holding, its admittedly "unsatisfactory" character, the fact that the Court reached a result not contemplated or argued for by either of the parties, and the very close division of the Court—a division the closeness of which is underscored by the Court's earlier four-to-four decision in *Atlantic Coast Line R. Co.* v. *Brotherhood of Railroad Trainmen,* 385 U.S. 20 (1966),[2] we would respectfully urge that the

[2] Not only was the decision here reached by a one-vote margin, with two Justices not sitting, but it is reasonable to assume that in the Court's earlier decision in *Atlantic Coast Line R. Co.* v. *Brotherhood of Railroad Trainmen,* 385 U.S. 20 (1966), a portion of the majority in the present case may have voted to uphold an injunction issued by the District Court for the Middle District of Florida against the same picketing *as a matter of Federal law.* In that case, the Court upheld, by a four-to-four vote, a judgment of the Court of Appeals for the Fifth Circuit (362 F.2d 649) which had reversed, on the basis of the Norris-La Guardia Act, the judgment of that District Court granting such an injunction. The seven Justices who participated in the present decision were among the eight Justices voting in that case.

Certain of the Justices who voted to affirm the denial of the injunction in that case may have done so on the basis of the bar of the Norris-La Guardia Act, notwithstanding their views with respect to the legality of the present petitioners' conduct (see Order announcing dissents from grant of Stay Application, 384 U.S. 967 (1966)). It may well be that one or more of the Justices who have now declined to state the applicable standards of Federal law voted to reinstate the Federal court injunction in the prior case, thus now

case be reheard with a specific direction to present argument on the following questions:

A. In the absence of any interference with a Federal regulatory regime or any governing provision of Federal substantive law (as the Court has held), does permitting state law to function with respect to employment of railway labor "self-help" weapons on third parties to labor disputes threaten any desirable principle of uniformity with respect to railway labor-management relationships[3] to the extent

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evidencing a change in their views as to whether there should be a Federal standard and whether the unions' conduct is lawful under it. If this is correct, it would appear to afford additional reason for the grant of a rehearing in which the questions outlined above could be fully argued.

[3] While no one has ever suggested in this case that there are "cosmic" principles condemning the secondary boycott (see Slip Opinion, p. 16), it is fair to say that it has had scant support as a proper means of conducting labor-management relations in the past 20 years. A series of Congressional enactments—in 1947 and 1959—have been aimed at it, and the same has been the course of legislation and adjudication in the states. See, *e.g.*, Ariz. Rev. Stat. § 23-1321; Colo. Rev. Stat. § 80-4-6(2)(h); Haw. Rev. Stat. § 377-7(7); Idaho Code § 44-801; Iowa Code Ann. § 736B.1; Kan. Stat. Ann. § 44-809(a); Mass. Gen. Laws Ann., Chapter 149 § 20C(f); Minn. Stat. Ann. § 179.40; Neb. Rev. Stat. § 48-901; N.D. Code §§ 34-08-01, 34-12-03(2)(e); *W. E. Anderson Sons Co.* v. *Local Union No. 311*, 156 Ohio 541, 104 N.E.2d 22 (1952); Ore. Rev. Stat. § 662.210; Penn. Laws Ann., Title 43, § 211.6(2)(d); Tex. Civil Stat., Art. 5154f; Utah Code, § 34-108(2)(e); Wis. Stat. Ann. § 111.06(2)(g).

It is, accordingly, somewhat academic to postulate that there would be a lack of uniformity of state court decisions if the states were permitted to apply their own standards, in that a number of states might hold the secondary boycott to be desirable while others would enjoin it. Whatever inconsistency might occur as between state court tribunals as to the precise place to draw the line prohibiting secondary boycotts would hardly, we submit, compare with the consequences of having no legal restrictions whatsoever on the subject. Once again, if Congress were distressed by the inconsistency of state court action in this area, it could act to plug the statutory gap by imposing a uniform Federal standard.

As the opinion observes, there is no express sanction in the Railway Labor Act for any form of "self-help" (Slip Opinion, pp. 9-10). It is, we submit, too much of a leap to proceed from the

that the application of state law should be held to be constitutionally precluded?

B. On the assumption that state law should be held to be superseded because of the need for uniformity, is it appropriate for this Court to declare what the substantive rule of Federal law applicable to the petitioners' conduct is, and if so, what should that rule be?

Of course, our position would be that, given supersession of state law, the Court is competent to enunciate, and should enunciate, the rule of Federal law prevailing here, and under that rule of law the petitioners' conduct should be held to be unlawful and unprotected.—The most extraordinary aspect of the Court's decision, and the point on which we submit that further argument would be most desirable, is the Court's refusal to enunciate what the legal standard governing petitioners' conduct is, after having held that that standard is a question of Federal law and that the state courts are powerless to apply standards derived from state law.

Accordingly, we shall now address ourselves to certain of the undesirable and anomalous results of the Court's refusal to enunciate the applicable Federal standard after holding that state law was superseded.

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premise that since orthodox self-help weapons—such as the strike or a carrier's continuing its operations with replacements—may not be interfered with by the states, the use of economic weapons directly against third parties may also not be interfered with by the state, particularly where the application of those weapons against persons who are not parties to a dispute threaten, as was found here, the economic strangulation of an entire state.

The Court's opinion observes that: "The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the states could prohibit the parties from engaging in *any* self-help." (Slip Opinion, p. 11, emphasis original) With great respect, the short answer is that no state decision that we know of has ever tried to do this, and it would be time enough to deal with that case when it was presented.

First.—The Court's decision was apparently reached in the name of neutrality between labor and management. The Court acted in the name of the principle that "it is for the Congress, and not the courts, to strike 'the balance between the uncontrolled power of management and labor to further their respective interests'" (Slip Opinion, p. 22).—But the very result of the Court's action is to strike such a balance—if the one-sided result achieved can even be called a "balance." The result of the Court's decision, in unvarnished fact, is that short of violence—a technique which as yet has few respectable advocates—railway labor unions may in fact use their "uncontrolled power," without legal restriction, against third party rail carriers. The Court's decision accordingly belies the principle of neutrality on which it purports to be based.

The only views which the Court enunciated on the substantive Federal law are noncontroversial and indeed are scarcely inconsistent with the result for which we contended.[4] Nonetheless, when the Court's declared refusal to adjudicate rights and duties in this area is added, the result—as the Court later states—is that all kinds of railway labor picketing, primary or secondary, become protected against state proscription—or, we suppose, against Federal injunctive proscription. (Slip Opinion, p. 23) The result is precisely the same as if Congress had passed a statute

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[4] These views are:

(a) The Court was willing only to hold that as a matter of substantive law the Railway Labor Act "permits railway employees to engage in *some* forms of self-help free from state interference;" (Slip Opinion, p. 20, emphasis original) (b) based upon analogy to the Labor Management Relations Act, this protected self-help was said to include "peaceful 'primary' strikes and non-violent picketing in support thereof;" (Slip Opinion, pp. 20-21); and (c) the Court further observed that "it cannot categorically be said that *all* picketing carrying 'secondary' implications is prohibited." (Slip Opinion, p. 21, emphasis original).

affirmatively declaring the practice of secondary boycotts on the nation's railroad system to be one of the keystones of the country's public policy. Of course, Congress has never remotely considered doing any such thing. To be sure, as the Court states, this rule is only applicable until Congress decrees to the contrary; but the same is true with respect to any decision of the Court in the labor area, the very few which are based on such constitutional grounds as freedom of speech excepted.

Second.—This result—that secondary boycotts on the nation's railroads are absolutely protected as the result of the disclaimer by this Court of the power to adjudicate—produces paradoxical consequences. The right to strike and picket on the nation's railroads has for obvious reasons always been more closely circumscribed by Federal legislation than those rights in industry generally, under the National Labor Relations Act and the Labor Management Relations Act. But the practical result of the Court's decision in this case is that secondary boycotts—of a sort which would be unfair labor practices, would be subject to a preliminary injunction, and would be subject to a claim for damages, if practiced in any industry, however inessential, subject to the Labor Management Relations Act—are subject to no inhibition whatsoever if practiced by a railroad union against railroads other than the one with which it has a dispute.[5] Once again, the result is not to impose a

[5] The Court, in stating the facts presented, has minimized the details of the unions' conduct here which, in our view, put it well within the core of the conduct prohibited by enactments such as Section 8(b)(4) of the LMRA, 29 U.S.C. § 158(b)(4). We note that the Court finally admits that the conduct here could not be characterized as purely "primary" and holds that picketing "whether characterized as primary or secondary" "must" be deemed protected conduct. (Slip Opinion, p. 23)

It perhaps bears brief restatement that the announced purpose of the picketing was *not* to permit general operations in the Terminal,

"neutral" standard of labor-management relations until Congress acts. Quite the contrary. The result is to put in the hands of railway labor powers to use weapons against third parties which are without counterpart in all of American industry.

Moreover, there are no self-help weapons that the third party rail carrier has against the railroad unions which might be deemed countervailing to the extraordinary powers which the Court has, by its decision, vested in the

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apart from those connected with FEC interchanges, to continue while urging employees not to handle FEC-related work. Quite the contrary; the purpose and technique of the picketing was to bring all the operations in the Terminal to a halt until the nonstruck carriers hurt badly enough to stop doing business with the FEC. There is a world of difference between the two.

Thus, the first admonition on the placards carried by the pickets was: "DO NOT CROSS." All but one of the entrances to the Terminal were picketed, including those used exclusively by trains not engaged in interchange with the FEC; and the only non-picketed exception was an entrance used solely by the FEC. The picketing had the effect of bringing all the activities within the Terminal to a halt. The Court's opinion refers to: "The Terminal's characteristics which made it impossible for the pickets to single out and address only those secondary employees engaged in work connected with the FEC's ordinary operations on the premises." (Slip Opinion, p. 20) But there is nothing in the record that indicates that the pickets had any intention whatsoever of singling out those employees. The statement referred to in the Court's opinion, Slip Opinion p. 4, n. 6, that a union official stated that the picket lines would have been taken down to allow movements not connected with the FEC to pass, is a statement which was made solely in court three weeks after the picketing took place, and at a time when restraining orders were already in effect. No intention of any such kind was ever communicated to the nonstruck carriers at the time the picketing took place or at any other time than by this official's self-serving testimony before the state court. Obviously it was an afterthought attempt to put a better face on the petitioners' conduct. (See generally, Brief for Respondent, pp. 7-12)—In short, as we developed in our brief on the merits, while the lines in certain areas between what is protected and prohibited under the LMRA may be somewhat fuzzy, what the unions did here, at least in substantial part, went well beyond the lines that have been drawn in industries governed by the LMRA.

unions. The effect of the Court's decision, then, is to disturb the balance of labor-management relations by permitting one party to a dispute to use self-help weapons against a third party who has no weapons with which to retaliate. Indeed, one of the reasons for the widespread condemnation of the secondary boycott is precisely that it extends the labor-management struggle to parties who have no interest in the dispute and who cannot take any action to settle it other than to knuckle under to the demands of the union that they stop doing business with the employer who actually has the labor dispute. See *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 100 (1958); 93 Cong. Rec. 4323 (1947) (remarks of Senator Taft). What course of action is open to the nonstruck carriers in the light of the Court's withdrawal of the benefits of the rule of law from them is not stated. Indeed, the third-party carrier's freedom to take any self-help actions, or even to acquiesce in what the union is seeking to force it to do, is substantially qualified by its duty to maintain operations, underlined by the public service aspects of its business. See *Brotherhood of Railway Clerks* v. *Florida East Coast R. Co.*, 384 U.S. 238, 244-45 (1966).

Moreover, here the nonstruck carriers are under a Federal court injunction forbidding them from doing the very thing which the unions are trying to force them to do—that is, stop interchanging cars with the FEC. See *Florida East Coast R. Co.* v. *Jacksonville Terminal Co., et al.*, No. 63-16-Civ.-J., M.D. Fla., January 30, 1963. The Court's opinion offers no answer to the dilemma posed by this injunction.

Third.—The Court in part declined to adjudicate the content of the Federal rights and duties in this area because it considered that other judges at other times had been

guilty of unwarranted "free-wheeling judicial exercises." Slip Opinion, p. 13. Accordingly, the Court was content simply to declare that pure primary picketing is undisputably lawful and that violence is undisputably unlawful. Since neither is involved in this case, this declaration of the legality of the "polar" alternatives, as the Court characterized them, is frankly not very helpful. Because the Court conceived that the distinctions to be drawn here with respect to the forms of conduct which might be considered protected and those which might be considered unprotected are complex, and because it held that it "lacked the expertise and competence to undertake this task" of drawing the lines, it proceeded to hold, as we understand it, that any act of a railway labor union directly pointed at a third party carrier, short of violence, in aid of the union's cause in a labor dispute is protected against state interference as a matter of Federal law.

This is not the customary approach of this Court when confronted with an interstitial gap in the Federal scheme for the regulation of labor relations. The prior decisions of the Court—and not simply those in perhaps a discredited era of the adjudication of labor-management relations—indicate that this is not the proper approach. For example, in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), after the Court held that the substantive law to be applied in suits under Section 301(a) of the Labor Management Relations Act was Federal law, that Federal law was left to a case-by-case adjudication along common law principles in light of whatever guidance by way of analogy or otherwise the Federal statutes bearing on the subject might give. See 353 U.S., at 456-58. Of course, since Congress had not promulgated a code of Federal labor contract law, the result was the beginning of an era of largely

judge-made law. This holding has led to a long line of cases in this Court adjudicating on a case-by-case basis—with only tangential and inferential support in acts of Congress—what the content of the Federal law of labor contracts is.[6] The decision in *Lincoln Mills* was not reached without dissent, see 353 U.S., at 459-60, 462-63; that dissent to a substantial degree embodied the philosophy which now has found expression in the Court's opinion. But we had not supposed that the approach of the majority of the Court in *Lincoln Mills* was no longer good law or that it was an example of a reversion to the judicial philosophy of a bygone era. For a similar extrapolation by the Court from the available Federal labor statutes—hardly reflective of an outmoded philosophy—see *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

One need not look far from the case at hand to find a decision in which the Court rejected the Federal law abstention doctrine of the majority opinion here. In *Brotherhood of Railway Clerks* v. *Florida East Coast R. Co.*, 384 U.S. 238 (1966), this Court, because of the necessity of the subject matter, sanctioned a course of conduct under which a Federal district court—in the very labor dispute from

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[6] See, *e.g.*, *General Electric Co.* v. *Local 205*, 353 U.S. 547 (1957); *Goodall-Sanford, Inc.* v. *United Textile Workers*, 353 U.S. 550 (1957); *United Steel Workers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steel Workers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962); *Retail Clerks Int'l Ass'n* v. *Lion Dry Goods*, 369 U.S. 17 (1962); *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962); *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962); *General Drivers, Warehousemen & Helpers* v. *Riss & Co.*, 372 U.S. 517 (1963); *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *Auto Workers* v. *Hoosiers Cardinal Corp.*, 383 U.S. 696 (1966).

which the attempt to impose secondary pressures on others at bar emerges—adjudicates, on an *ad hoc* basis, the extent to which the primary parties to the dispute are permitted to use their self-help weapons against each other. It is somewhat paradoxical to say that the Federal courts are competent to adjudicate the extent to which it is lawful for the primary parties to the dispute to use self-help weapons against each other—such as by changing the terms and conditions of employment—but that it is beyond their competence to set any limits on the use of self-help weapons upon third parties.

In short, the customary rule applied in the labor field, as in other fields touched by Federal law, is as put in *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1943), that: "in the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rules of law . . . ."—This is particularly the case, we submit, where there are some "legislatively based principles" (Slip Opinion, p. 13) available for guidance.

Fourth.—As previously indicated, in adjudicating the rights and duties of the parties here, there is available to the Court a substantial amount of statutory guidance which could be applied at least by analogy. In the first place, there is the extensive body of adjudication under the secondary boycott provisions of the Labor Management Relations Act. Although, as the Court has held, and as we contended, the "LMRA has no direct application to the present case," the employment of "analogies drawn from the LMRA" (Slip Opinion, p. 8) is a useful practice and one which the Court should, we submit, follow. In an effort to fill the statutory gap, particularly the gap presented once the Court has undertaken to hold that the states may not act in this area, analogies from the LMRA would be very

much in point. It is, after all, one of the two basic Federal statutes regulating labor relations. Because of the essential and basic nature of the railroad industry, the fact that Congress has always hemmed in the rights of self-help of railway labor and management to a greater extent than those of labor and management generally, and the Congressional interest in the maintenance of railroad operations free of interruption, certainly it would not be unreasonable to hold that at the very least secondary conduct prohibited under the LMRA would be prohibited as an *a fortiori* matter to railway labor.

In addition, there are other statutory sources of guidance available. The Interstate Commerce Act imposes affirmative duties upon rail carriers to conduct operations, including interchange operations. The Railway Labor Act, by setting forth a panoply of procedures which must be followed by the actual parties to a dispute before they are free to use self-help weapons on each other, indicates that carriers who do not have the benefit of these procedures are not to be made the victims of self-help actions on the part of the primary parties to a labor dispute. We contend that it cannot be attributed to Congress that while a carrier which actually has a dispute with its employees cannot be made the object of union self-help measures until it has had the benefit of the protracted procedures for adjustment, negotiation and mediation of the dispute, designed "to avoid any interruption to commerce or to the operation of any carrier engaged therein" (Railway Labor Act, Section 2(1)), a carrier not having a dispute with its employees may be made the object of railway union self-help measures without having had *any* of the benefits of the procedures specified in the Act.—These contentions and other reasons why petitioners' conduct is unlawful as a matter of Federal law are more fully articulated in the Brief for

Petitioners in *Atlantic Coast Line R. Co.* v. *Brotherhood of Railroad Trainmen*, 385 U.S. 20 (1966), No. 220, O.T. 1966, pp. 23-41, 50-64.

Indeed, as was articulated in that brief, there are more particularized reasons, in terms of the facts of the instant case, why the picketing is enjoinable as a matter of Federal law. For one thing, the objectives of the picketing were unlawful since it sought to require the unstruck carriers to impose an unlawful embargo on the FEC. (Brief for Petitioners, No. 220, O.T. 1966, pp. 59-64.) Certainly, if the picketing sought to accomplish a result unlawful under Federal law, it should not be held to be protected by Federal law. In the brief in the 1966 case, the present respondent and the other nonstruck carriers developed reasons, from the terms of the Interstate Commerce Act, for the illegality of the embargo which the unions attempted to make them levy on the FEC. The Court's present opinion is totally silent on this matter. Moreover, the illegality of the objectives of the picketing is underlined by the fact that the purpose of the picketing was to force the nonstruck carriers to do what a Federal court injunction forbids them to do—stop interchanging cars with the FEC. See page 11, *supra*. Once again, the Court's opinion does not deal with this matter.

Because an injunction granted under Federal law was at issue, the illegality under Federal law of the unions' conduct was developed in our brief in the 1966 case to a much greater extent than it was in the case at bar which involved only a state court injunction. Since the Court has found that the conduct here at bar is to be measured only by the standards of Federal law, and has not analyzed the extensive bases of illegality under Federal law of the unions' conduct which we advanced in our brief in the 1966 case, it would appear, in the interests of the proper ad-

ministration of justice, that the grant of a rehearing would be desirable so as to permit a full exploration of the bases on which petitioners' conduct is violative of Federal law.

In short, there are here available "legislatively based principles" (Slip Opinion, p. 13) for guidance by analogy, and other, more specific statutory materials and aids to adjudication at least as extensive as those which the Court has employed in adjudication in other areas.[7] We analyzed these in considerable detail in our brief in the 1966 case; the Court's discussion of the governing principles of Federal law in its present opinion is not, we respectfully submit, responsive to the substantive contentions which we made there.

The essential judicial task here, we submit, is adapting the available legislative materials to the solution of a problem not expressly contemplated by the legislators. It is the filling of an interstitial gap in the law—a task of a nature which the Court does every day. With due respect, the question as to whether the Court should undertake this is *not* one of expertise and competence; it is a question, so like many others, of the Court's power and duty. Having held state law to be superseded, we respectfully submit that the Court has the power and duty to pronounce what the applicable standards of Federal law are here.

We submit that taking up such a task here—and filling the relatively small interstitial gap in the Federal labor

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[7] The Court's opinion also suggests that it is reluctant to face the question of the illegality of the petitioners' conduct under Federal law as a *de novo* matter without preliminary screening by an administrative agency, such as that available under the LMRA. (Slip Opinion, p. 22) If the Court feels that there is need of a preliminary sifting of the matter by an administrative agency, the Court could, we suggest, submit the unique fact situation presented by this case to the National Labor Relations Board, as a master, for an advisory report as to whether the petitioners' conduct here, if undertaken in an industry subject to the National Labor Relations Act, would violate Section 8(b)(4) of the Act.

legislation that this case has unearthed—is a task of considerably less magnitude than that which the Court undertook for the Federal judiciary in the *Lincoln Mills* case—that of articulating a corpus of Federal labor contract law—not to mention the bodies of adjudication which resulted from this Court's decisions in *Brown* v. *Board of Education*, 349 U.S. 294 (1955), and the reapportionment cases, *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Whatever critics may have said with respect to the expertise and competence of the courts in these areas, the fact remained that the courts had the duty to deal with the problems presented and the power to devise solutions, and the courts fulfilled those functions.

The opinion also suggests that because of the unique nature of the railroad industry (Slip Opinion, p. 22) the Court should hesitate to venture into the field of pronouncing the unions' conduct lawful or unlawful here. The Court also suggested that this uniqueness was one of the reasons why it was precluded from applying the standards of Section 8(b)(4) of the LMRA by analogy. But for the reasons we have outlined above, drawn from the teachings of the Interstate Commerce Act and the Railway Labor Act, it is fair to assume that any secondary conduct prohibited under the LMRA would be *a fortiori* prohibited to a railroad union. Under the present state of the legislation, we submit that the proper course would be for the Court to apply this standard; if Congress believes that the balance struck needed particular "fine tuning" in the railroad industry it could make subsequent statutory adjustments, as it did under the LMRA in 1959 in the case of the garment and construction industries.[8]

[8] The special provisions for the garment and construction industries were inserted by the Landrum-Griffin Act in 1959. The basic secondary boycott provisions were enacted, of course, in 1947. See Section 704(b), Public Law 86-257, 73 Stat. 542, adding Section 8(e), 29 U.S.C. § 158(e).

Fifth.—The Court's opinion repeatedly indicates that a legislative solution of the problem would be most satisfactory. But, as we have indicated, any resolution of the parties' rights and duties which the Court reached would be subject to legislative correction; the existence of the legislative power hardly furnishes a justification to the Court for not deciding this case, particularly when it has ousted the states' power to decide it. And, if we may speak in terms which are generally not of concern to the judiciary but which we believe the Court's emphasis upon the legislative solution here justify, the present situation is *not* one which lends itself to a ready legislative solution to protect the obviously legitimate interests of the nonstruck carriers:

(a) In the first place, the situation presented here of secondary conduct applied to a nonstruck rail carrier by a rail union is unique. Secondary pressures on the country's rail system have been, thankfully, a rarity, as the Congressional debates in connection with the question whether the Labor Management Relations Act provisions with respect to secondary boycotts should be expanded to rail unions indicate. The "case arises out of the Nation's longest railroad labor dispute." (Slip Opinion, p. 1) The uniqueness of the situation hardly commends the problem to a legislative solution. Legislation generally deals with abuses of a general or recurring nature.

(b) Any attempt to protect the rights of the nonstruck carriers here would be inextricably intertwined, as a legislative matter, with supporting the strike-breaking efforts of the FEC. While Congress may be expected fairly to resolve the interests of third parties to labor disputes in passing a general statute—as it did in Section 8(b)(4) of the LMRA—where the statutory solution is one in the context of a particular case, as a legislative matter (un-

like, of course, the situation in a court of law), the issues as to protecting the bystanders become intertwined with the question of who is right or wrong as between the primary parties to the dispute. Thus, there becomes relevant to the question whether the nonstruck carriers can ever obtain legislative relief the fact that the FEC's labor relations are known to be among the worst in the industry and that the FEC strike, and that carrier's success in operating despite the strike, has become a *cause celebre* in labor circles.

It is also not irrelevant to note at this point that the FEC—in whose boat the nonstruck carriers would tend to be put in any legislative resolution—enjoys rather bad Congressional relations. It is well known, and indeed amply supported by the legislative history, for example, that a recent amendment to the Bank Holding Company Act was enacted primarily for the purpose of curbing the powers attributed to the present management of the FEC by reason of the common control of the FEC with a chain of banks in the State of Florida.[9]

For the reasons we have indicated, the prospect of a legislative remedy here for the nonstruck carriers is a dim one. Certainly this underscores the error of the essentially pragmatic judgment of the Court in declining to adjudicate the rights and duties of the parties under Federal law—

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[9] The amendment is Section 2(b), Public Law 89-485, 80 Stat. 236, 12 U.S.C. § 1841(b). For the purpose of the amendment, see S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), pp. 3-4; 112 Cong. Rec. 12,380; 12,382; 12,388-89 (remarks that the amendment should be passed because "the Florida East Coast Railway, of which Mr. Edward Ball, the principal Trustee of the [DuPont] Estate, is Chairman, has continuously defied its duty under the Railway Labor Act to try to settle the Florida East Coast Railway dispute"); 12,390-92; 12,461; 12,463 (1966).

while ousting the state courts of their power to apply state law—and in remanding the third party carriers to the consideration of Congress.

Because of the unique nature of the Court's ruling here, and the admittedly unsatisfactory nature of that ruling; because the Court proceeded on a basis which was not suggested by any of the parties; because of the incompleteness—absent full exploration of the issues by counsel in this case—of the Court's discussion of the possible bases for the illegality or legality of the petitioners' conduct as a matter of Federal law; and because of the practical unavailability of the legislative remedy which is clearly the premise of the Court's decision, we respectfully suggest that this is the unusual case in which a rehearing, expressly directed by the Court to one or both of the issues[10] specified at pages 6-7 above, would be in the interests of justice.

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[10] We do not mean to suggest that in such a rehearing the position—which we, of course, deem correct—taken by the three dissenting Justices would be precluded. That position is that since Congress has left secondary conduct directed by rail unions against rail carriers with whom they do not have a dispute unregulated, the state courts, as the primary guardians of the personal and property rights of the state's citizens, may act through their injunctive powers. We might respectfully suggest in passing that perhaps the basic error into which the Court fell in holding state law superseded was its reasoning from the fact that there may be some limits, imposed by Federal law, on what the states may do in this area, to the conclusion that accordingly the entire subject is governed by Federal law. This is clearly not correct: for example, the First Amendment imposes limits on the application of the state laws of libel and slander, see, *e.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), but this does not mean that all libel law is accordingly Federal law. Clearly, if a majority of the Court were of opinion either that the proposition advanced by the dissenters was correct, or that while Federal law governed, it did not protect the conduct here involved, the judgment of the state court should be affirmed.

CONCLUSION

For the reasons stated, this Petition for Rehearing should be granted.

Respectfully submitted,

PAUL A. PORTER
DENNIS G. LYONS
DANIEL A. REZNECK
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Respondent

April, 1969

Of Counsel:

ADAM G. ADAMS, II
ADAMS & ADAMS
Jacksonville, Florida

ARNOLD & PORTER
Washington, D. C.

Certificate Pursuant to Rule 58

The undersigned, attorney for the Respondent in this matter and a member of the bar of this Court, pursuant to Rule 58 of the Rules of this Court, does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

DENNIS G. LYONS

Dated: April 18, 1969